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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 552

WILLIAM FREDERICK ZIMMER,

*Petitioner,*

—v.—

STATE OF KANSAS,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

William Frederick Zimmer prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas, entered in the above-entitled case on April 8, 1967.

### Citations to Opinions Below

The opinion of the Supreme Court of Kansas is reported in 198 Kan. 479 (1967) and is printed in the Appendix, *infra*.

### Jurisdiction

The judgment of the Supreme Court of the State of Kansas was entered on April 8, 1967 (R. 510). A timely petition for rehearing filed on April 28, 1967 (R. 525), was

denied on May 1, 1967 (R. 527). On July 18, 1967, Mr. Justice White issued an order extending the time to file this petition for writ of certiorari until August 30, 1967, and staying the execution of the death penalty pending the action of the Supreme Court on the petition. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3) since rights, privileges, and immunities are claimed under the Constitution of the United States.

## Questions Presented

1. Whether petitioner waived his right under the Fourth and Fourteenth Amendments to be free from unwarranted search and seizure of his automobile, when his consent to such search and seizure was given when he had not been advised of his right to refuse consent and when the police knew that he was under the influence of alcohol.

2. Whether petitioner was deprived of his right to counsel under the Sixth and Fourteenth Amendments by the trial court's refusal to grant his initial request for appointment of counsel.

3. Whether petitioner's rights under the Due Process Clause of the Fourteenth Amendment were abridged by the trial court's refusal to grant a continuance to enable petitioner's counsel adequate time to prepare for trial.

## Statement of the Case

Petitioner, William Frederick Zimmer, was convicted on April 1, 1965, of the offenses of kidnaping in the first degree, with harm inflicted (K. S. A. 21-449), and of murder

in the first degree (K. S. A. 21-401), after trial in the Second Division of the District Court of Shawnee County, Kansas. The jury imposed the death penalty for the kidnaping charge and life imprisonment for the murder charge. The charges grew out of the abduction and slaying of Gladys Cora Johnson, a Negro girl aged seven years.

At trial, the prosecution presented the following evidence. At 7:30 A.M. on Saturday, November 14, 1964, in Topeka, Kansas, Betty Michael, the mother of Gladys Cora Johnson, left for work, leaving her three children at home to be looked after by neighbors (R. 49). Shortly after 8:00 A.M., two of the three children came to the front door of Mrs. Reba Glasgow, who lived nearby. The children were crying and screaming, and they said that a man had taken away their sister (R. 43).

Driving around north of Topeka that morning, Staff Sgt. Charles C. Guillory drove into a field to examine a car he saw parked there. The occupants of the parked car were a white man and a young Negro girl. After a brief conversation with the driver, Guillory noticed that the little girl was crying, although she did not say anything. As he left, he observed the make of the car and wrote down the license number (R. 45). He reported the incident to the sheriff's office by telephone about 9:00 A.M. The license tag was registered in petitioner's name. Zimmer had once been arrested for child molestation but the charge had been dismissed for want of prosecution (R. 150-52). On Sunday, the next day, Guillory identified photographs of Zimmer as being the man he had seen and a photograph of Gladys Cora Johnson as being the girl. He later identified Zimmer in a lineup and identified photographs of Zimmer's car as being the one he had seen in the field (R. 397-99).

Marjorie Siebert, who worked in a liquor store in Wamego, Kansas, testified that during the noon hour on Saturday, November 14, 1964, she observed a man, whom she later identified as Zimmer, park a car by the curb and make a purchase in a restaurant next door (R. 400-01). During this time, she observed a small Negro child between six and seven years of age in the car. The girl did not attempt to get out of the car and was not crying. The man later returned alone and bought some liquor in her store. She testified that there were blood stains around his fingernails (R. 46-47).

Zimmer was apprehended by officers of the Marysville Police Department in Marysville, Kansas, at about 8:55 P.M. on Sunday, November 15, 1964, while he was talking to his brother-in-law, Red Harberts, in front of the Dixon Tire Company (R. 52-55). One officer asked him to get in the police car and come with them, because "there was a matter to be straightened out" (R. 66). Zimmer was driven to Harberts' house, where the police expected to find FBI Agent Topousis. When they did not find him, they drove to the police station, then back to Harberts' house where Agent Topousis was finally found (R. 188-90). Agent Topousis placed Zimmer under arrest and asked Zimmer where his car was. Zimmer replied that it was "up the street somewhere." Agent Topousis asked, "Would you mind if we looked into your car?" Zimmer replied: "I don't mind at all. You can look at anything I have" (R. 69-70). He was then taken to the police station. Several descriptions were given of Zimmer's condition during this entire period of arrest. One officer said: "I'd say he'd been drinking. As far as being drunk that I couldn't say" (R. 55). Another officer testified that "He was a little loose

kneed or whatever you want to call it. He appeared to me to be drinking. . . . [H]e appeared to have a thick tongue you know like a person been drinking some." He was slow responding to questions (R. 68). Red Harberts testified that Zimmer "was very much intoxicated at the time" (R. 191). Zimmer had two half pints of whiskey with him when arrested (R. 72).

Zimmer was first advised of the charges against him at the jail house (R. 71). Agent Topousis testified that he was immediately advised of "his constitutional rights" (R. 71), but Officer Estes testified that this did not occur until shortly after the questioning began. Only the right to counsel and the right to remain silent were mentioned (R. 58). Questioning lasted from about 9:20 to about 10:30 P.M. (R. 61). While the questioning went on, Officer Estes, Officer Bogart and Red Harberts went to search Zimmer's car. The car was searched thoroughly with a flashlight. No weapon was discovered in the car except a shotgun in the trunk (R. 68). Some spots of red were also discovered in the trunk (R. 63). After these three men returned and reported to the police station, Agent Topousis searched the car with similar results (R. 70).

Meanwhile, the Topeka Police Department had been contacted, and around midnight of November 15, Officer Monthey of the Topeka Police Department, two other police officers and the County Attorney arrived in Marysville. Zimmer was again advised of his right to have a lawyer and of the fact that statements made by him could be used against him (R. 404). Officer Monthey told Zimmer that they were going to want to look at his car and to take it to Topeka to process it. Zimmer replied: "Be my guest. Do what you want with it" (R. 404). It was still noticeable at

this time (1:00 A.M.) that Zimmer had been drinking (R. 406). Officer Monthey then took a detailed statement from Zimmer. Zimmer said that he was employed by the Union Pacific Railroad in Kansas City, Kansas. On Friday, November 13, 1964, he got off work about 4:00 P.M. and drove to Topeka. There he bought some shotgun shells and purchased at least two pints of whiskey. He drank some beer and some whiskey at a tavern. He spent the evening in the company of a woman and a man he met. The next thing he remembered was waking up Saturday morning in his car near the Topeka Fire Station with no money except $6.00 hidden in a secret compartment in his wallet. He had a drink and, according to his statement, spent the rest of the day driving in the vicinity of Marysville, Manhattan, Concordia, and Miltonville, Kansas, and doing some pheasant hunting on the way. He shot two pheasants, but threw them away. He spent Saturday night with a lady acquaintance in a motel in Washington, Kansas, hunted pheasant again on Sunday, and in the early evening sought out his brother-in-law, in whose presence he was apprehended (R. 408-09).

Following his statement, Zimmer was permitted to place a telephone call to Red Harberts to ask him to call his wife and request that she find him a lawyer (R. 405). Zimmer was then driven to Topeka, arriving about 6:00 A.M. on Monday, November 16th. At about 9:00 A.M., after Zimmer's car had already arrived in Topeka, Zimmer was served, for the first time, with a search warrant concerning the car. Officer Monthey testified that the warrant was given to Zimmer, but that he handed it back, saying that he "wasn't interested in it" (R. 413). Zimmer's car was thoroughly searched and examined, and samples from the

car were sent to the Kansas Bureau of Investigation. A hatchet was discovered in the trunk of the car, in a position which should have been visible to the searchers the night before (R. 89). Traces of blood on the blade of the hatchet were of Gladys Cora Johnson's blood type (R. 125), and several hairs stuck to the blade corresponded to the hair of Gladys Cora Johnson (R. 133). Zimmer denied that it was his hatchet or that he had ever seen it before (R. 144). The police admitted that the hatchet had not been examined for fingerprints (R. 92-93). Monday evening, Zimmer received a visit from his wife and Mr. Mahoney, an attorney from Kansas City (R. 161).

On Tuesday, November 17, 1964, after further questioning, Zimmer made a statement that he did remember "being in the pasture north of town with a little colored girl and she was crying" (R. 145). He didn't remember anyone coming around the car; he took a drink of whiskey and lost consciousness. When he awoke, it was about dusk, and he discovered the girl lying in the trunk of his car, dead. Zimmer said that he placed the body beside a nearby dry-wash and then drove around aimlessly, trying to remove evidence that the girl had been in his car. The rest of his statement corresponded to his original story (R. 145-46). Although Zimmer cooperated fully with the police in trying to remember where he had been when he hid the body of the girl, the body was not found until November 21, 1964. Autopsy established that the girl had been killed by a large crushing blow to the right side of the head. There were also four large wounds across the shoulder, one of which had crushed a vertebrae and cut the spinal cord (R. 436-37). There was no evidence of sexual molestation (R. 438).

At trial, Zimmer testified that he had left Kansas City Friday afternoon for a weekend hunting trip with his brother-in-law Red Harberts. The testimony as to his activities and drinking Friday night corresponds to what he had told the police. Saturday morning he woke up in his car and discovered that all of his money except $6.00 had vanished from his wallet. In the back seat was a man who said that Zimmer had promised to take him to Manhattan. Zimmer began the drive, but after several drinks he got into the back seat and let the other man drive. The next thing he remembers is waking up in a pasture by the car and discovering the body of the girl in the trunk of his car. He denied ever seeing Gladys Cora Johnson alive, and he said that he had told the police the contrary only so that they would stop bothering him (R. 165). The rest of his statement until the time of his arrest corresponds to what he told the police at the time of his arrest (R. 154-159).

According to the opinion of the Supreme Court of the State of Kansas, Mr. Sam Crow was appointed counsel for Zimmer on November 19, 1964, for the purpose of the preliminary examination which was held November 25th, at the conclusion of which Zimmer was bound over for trial to the District Court of Shawnee County (R. 511; App., *infra*, p. 3a). On December 18, 1964, Zimmer filed an application for appointment of counsel to represent him at trial. Mr. Crow was appointed to represent Zimmer during the hearing on the application, which was held on December 29, 1964 (R. 8). At the hearing it emerged that before his alleged offense, Zimmer had been earning about $600 a month, that his wife had been earning about $400 a month, that their home had a market value of about $10,000, that they owned two cars, that they had an account of about $2000 in

a credit union and about $800 in a bank account (R. 380-81). After charges had been filed in the present case, the credit union fund had been transferred to his wife, and he had signed papers turning the house over to his wife and giving her power of attorney. He did not know why his wife's counsel had requested that he do all this (R. 382). The following exchange took place between Zimmer and Mr. Hecht, the county attorney:

> Q. Mr. Zimmer, other than Mr. Crow or members of his law firm and other than the attorney who came to see you when you were in confinement in the city jail before Mr. Crow talked to you, have you talked to any other attorney? A. No, sir, I haven't been able to, I have been in jail.
>
> Q. Have you made any telephone calls to any other attorneys? A. No, sir.
>
> Q. Have you requested to do so? A. No, sir.
>
> Q. Have you sent any letters to any other attorneys? A. No, sir.
>
> Q. Have you written any letters at all while you have been in jail? A. I have written about three letters answering some letters I got from friends.
>
> Q. Your mail has been going out and coming in? A. I have received mail.
>
> Q. And your mail has been delivered out of the jail? A. As far as I know.
>
> Q. Have any attorneys other than the one who came to see you before Mr. Crow saw you, has anyone refused to handle your case? A. I haven't contacted any attorneys so how could they refuse? (R. 383).

On December 30, 1964, the trial judge denied Zimmer's application. The judge found that the defendant was "not

indigent and therefore is able to employ counsel of his own choosing. No evidence has been presented to show that defendant has made any effort to employ counsel, nor is there evidence that any counsel has refused employment" (R. 8).

On January 25, 1965, while Zimmer was still unrepresented by counsel, the court appointed a commission to examine the defendant to determine his competency to stand trial (R. 8-9). On February 2, 1965, the court accepted the report of the commission that Zimmer was competent to stand trial. That same day the court found that defendant "does not have counsel of his own choosing nor has he employed counsel, and that he has so advised this court, and that he has further advised this court that he does not intend to employ counsel" (R. 10). Mr. Elwaine Pomeroy was therefore appointed to represent Mr. Zimmer. No mention was made of the impending divorce action which, according to Appellee's Brief below (p. 43), Zimmer's wife had begun the day after the trial judge had denied Zimmer's request for counsel. The State filed a motion to intervene in this divorce suit in order to have a portion of the marital property set aside to defray the cost of the defense. This motion was denied, but not until February 5, 1965—three days after the trial judge had decided that counsel should be appointed.

At trial, one of Zimmer's main defenses was that of insanity, and Dr. Herbert C. Modlin, one of the three members of the sanity commission which had examined Zimmer, was called to testify. Dr. Modlin testified that in spite of the fact that Zimmer had been "wary" of answering questions before the sanity commission since he was not represented by counsel, he had finally answered many questions about

the events of November 13-15, 1964 (R. 202-203). The county attorney made a concentrated effort to use Dr. Modlin's recollection of that conversation to impeach Zimmer's earlier testimony (R. 209-15).

## How the Federal Questions Were Raised

1. The question regarding the illegal search and seizure of petitioner's automobile and the consequent admission of evidence from that seizure was raised in the specifications of errors filed after trial below (R. 256). No objection had been made at the trial to the reception of the evidence, but although the Supreme Court of the State of Kansas remarked about the applicability of the so-called "contemporaneous objection rule" (K. S. A. 60-404), it did not rest its disposal of the issue on this ground, apparently because the case was capital. The court found that there was "clear and convincing evidence of express, voluntary, intelligent consent" and accordingly found that there had been waiver of the right to be protected from illegal search and seizure (R. 521; App., *infra*, p. 34a).

2. Petitioner's temporarily appointed counsel argued at the special hearing on December 29, 1964, that the trial judge was required by the decisions of this Court following *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), to appoint counsel when petitioner first requested it (R. 377-78). The issue was specified as error following trial (R. 256) and discussed fully on federal grounds by the Supreme Court of the State of Kansas (R. 510-512; App., *infra*, pp. 2a-7a).

3. Counsel's motion for a continuance was made on March 12, 1965, three days before the trial was scheduled to

begin. It followed long argument about the effect of the County Attorney's refusal to have a certain pill found on petitioner's person at the time of arrest analysed at State expense, and about the fairness of allowing the State to endorse additional witnesses shortly before trial. Both of these issues were clearly understood to bear upon the ability of counsel to prepare petitioner's defense in the available time (R. 34-43). At the end of these discussions, when counsel's motions to have the pill analysed at State expense and to prevent the State from endorsing additional witnesses had been denied, the following interchange took place (R. 43):

> "Mr. Elwaine Pomeroy: Your Honor, I have a further matter to make then in view of the Court's ruling.
>
> The Court: All right.
>
> "Mr. Elwaine Pomeroy: We would respectfully move the Court for at least a one week's continuance in the trial of this case so as to allow us to adequately prepare for the defense.
>
> The Court: That motion will be overruled."

The denial of this motion was specified as error (R. 256) and was argued before the Kansas Supreme Court as a violation of the Due Process Clause of the Fourteenth Amendment. The Kansas Supreme Court considered the issue but expressly refused to find a denial of due process (R. 514; App., *infra*, pp. 11a-12a) in large part because it claimed that "no particular reason" was advanced for the motion, that is, that "good cause was not shown." The Court did not consider the context in which the motion was made, which gave ample reasons for the request.

## Reasons for Granting the Writ

1. The search and seizure issue in this case raises an important constitutional question concerning the standards to be applied in judging the force of an alleged waiver of a vital constitutional right. In this case, the police had no right to seize and search petitioner's automobile* without a warrant, unless petitioner waived his right to be protected from such invasion of his privacy by the Fourth and Fourteenth Amendments, because the search was neither incident to the arrest nor otherwise reasonable. *Preston* v. *United States*, 376 U. S. 364 (1964). Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Cooper* v. *California*, 17 L. Ed. 2d 730 (1967).

It was recognized in *Zap* v. *United States*, 328 U. S. 624 (1946), that the Fourth Amendment right against illegal searches and seizures may be waived. *Zap* was the sole federal authority for the Kansas Supreme Court's dismissal of petitioner's contention. But this Court has not yet set down specific standards for a competent waiver of this right. United States Courts of Appeals, which have frequently been faced with the precise question of what constitutes a competent waiver, have generally been strict in their requirements.** One such case is *United States* v. *Page*, 302 F. 2d 81 (9th Cir. 1962):

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* The fruits of the two illegal searches included a blood-stained cardboard box (R. 69, 416), a blood-stained newspaper (R. 73, 416), articles of clothing containing hair particles and blood stains (R. 73, 416-417, 445-446), and a shotgun and shells (R. 68, 73). In addition, the seizure and transport of the car to Topeka took place before issuance of the search warrant.

** The federal standards now apply to the States. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1963); *Beck* v. *Ohio*, 379 U. S. 89 (1964).

> The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be "unequivocal and specific" and "freely and intelligently given." There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. "Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. [Citing *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938).] Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact. The government's burden is greater where consent is claimed to have been given while the defendant is under arrest. [Citations omitted.]

In *United States* v. *Blalock,* 255 F. Supp. 268 (E. D. Pa. 1966), defendant, in reply to a request that he let his room be searched, replied that he "had no objection." Nevertheless, the court granted his motion to suppress the subsequently discovered evidence on the grounds that the warrantless search had been illegal. The court said:

> First, the consent must have been "intelligent." Obviously, the requirement of an "intelligent" consent implies that the subject of the search must have been aware of his rights, for an intelligent consent can only embrace the waiver of a "known right." . . . Certainly, one cannot *intelligently* surrender that which he does not know he has. . . . The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. . . . It cannot be said, then, that the Government has sustained its burden of showing that there was an intelligent waiver of a known right.

*Blalock* was cited with approval in *United States* v. *Nikrasch*, 367 F. 2d 740 (7th Cir. 1966).

In other Court of Appeals cases, however, it has not been found necessary that the police advise the concerned party of his right to refuse a search which would be illegal without a warrant. See *Robinson* v. *United States*, 325 F. 2d 880 (5th Cir. 1964); *Montana* v. *Tomich*, 332 F. 2d 987 (9th Cir. 1964); *Chapman* v. *United States*, 346 F. 2d 383 (9th Cir. 1965), certiorari denied, 383 U. S. 909 (1965); *Robbins* v. *MacKenzie*, 364 F. 2d 45 (1st Cir. 1966), certiorari denied, 385 U. S. 913 (1966).

The distressing problems involved in waiver of the right to counsel and the right to remain silent produced the precise safeguards laid down in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The right to refuse an illegal search is no less fundamental than either of these rights—and this Court has long recognized the close connection between the Fourth and Fifth Amendment freedoms. Consequently, it is vital that this Court specify that a person can no more waive the right to refuse an illegal search unless he has been fully informed of that right than he can waive the right to counsel without such a warning.

In addition to the question of warning, this case presents the problem of a man who was asked to waive a fundamental right while he was clearly under the influence of alcohol. A waiver must be made "intentionally," and "understandingly and knowingly," and "the standard . . . depends on the considered choice of the petitioner." *Fay* v. *Noia*, 372 U. S. 391, 439 (1963), citing *Carnley* v. *Cochran*, 369 U. S. 506, 513-17 (1962), and *Moore* v. *Michigan*, 355 U. S. 155, 162-65 (1957). There are many influences unrelated to po-

lice presence or actions which may affect the competency of a waiver whose validity is defined in such strict terms. Besides intoxication, such influences are shock, distress, exhaustion, temporary insanity, and hysteria. The problem of evaluating a waiver in the face of such influences has received very little attention in the courts. One case in point is *Logner* v. *North Carolina*, 260 F. Supp. 970 (M. D. N. C. 1966), in which the court said: "Even though the petitioner in his intoxicated state might attempt to waive his constitutional rights to remain silent or to have counsel, the waiver would have to be ineffectual *because the petitioner's judgment was impaired.*" [Italics added.] In the case at hand, even if petitioner was not in fact in such a state as would be called "intoxicated" or "drunk," his condition should at least have raised a serious doubt about his capacity to make a competent waiver. There must be some situations in which a man *should not be asked* to waive a constitutional right, particularly when, as here, the police could easily have avoided the necessity of making the request.

For both of these reasons, the search and seizure issue in this case is of substantial importance, meriting full consideration by this Court.

2. The failure of the trial court to appoint an attorney to represent petitioner after his initial application on December 18, 1964, was a denial of due process of law. As a result of this denial, petitioner did not have counsel to assist in preparation of his defense to two capital charges until February 2, 1965, almost three months after his arrest. Since the trial was scheduled to begin March 15, 1965, and since the trial court refused to grant a continuance before the trial (see Point 3, *infra*), petitioner was

materially prejudiced by the initial denial of his motion for counsel. Furthermore, in the intervening period between the denial of the request and the ultimate appointment of counsel, petitioner was examined to determine his capacity to stand trial. Testimony about this examination by one doctor was used to impeach petitioner at trial. Clearly this was a "critical" stage in the pre-trial proceedings. This Court has said that it will not stop to determine whether prejudice has resulted when counsel has been denied at such a stage, *White* v. *Maryland*, 373 U. S. 59 (1963).

The issue, therefore, is the propriety of the trial court's denial of petitioner's request for counsel on December 18, 1964. A substantial federal question is presented in this case concerning the responsibility of a trial court in seeing that a defendant in a capital case is insured a fair trial, with adequate assistance of counsel. The trial court refused petitioner's request in this case in part because it found that petitioner "is not indigent and therefore is able to employ counsel of his own choosing." While it is true that the evidence shows that petitioner was not entirely without funds, the evidence also shows that, even discounting his wife's impending divorce action, petitioner did not have available the $20,000 which, according to his appointed counsel after trial, would have been the compensation called for by the Topeka Bar Association's minimum fee schedule for the amount of work the case did in fact require (R. 249).

The court further said that "no evidence has been presented to show that defendant has made any effort to employ counsel, nor is there evidence that any counsel has refused employment," but given this Court's strict policy about waiver of fundamental constitutional rights, petitioner's behavior certainly cannot be considered a deliberate

waiver, made "intelligently and understandingly," as required in *Carnley* v. *Cochran,* 369 U. S. 506 (1962). Even the Kansas statute concerning right to counsel (K. S. A. 62-1304) requires that waiver of the right must be in writing.

Given the doubt about petitioner's ability to employ adequate counsel and the lack of a deliberate, competent waiver, the trial court had a duty to take no chance of letting petitioner's apathy prejudice the criminal process in such a fundamental aspect as representation by counsel. When a man is facing a capital charge based on a strong net of circumstantial evidence, it is wholly unrealistic to expect him to act calmly and intelligently with respect to his fundamental rights. Even the trial court eventually recognized its duty in this area, since its order of February 2, 1965, appointing counsel cites no further evidence of indigency and only adds that petitioner had advised the court that he did not intend to employ counsel. The trial court, by not acting upon the first request, failed to meet the standards required by the Sixth and Fourteenth Amendments. That error warrants correction by this Court,

3. The argument that the refusal to grant petitioner a continuance was a denial of due process of law is closely tied to the argument above concerning the refusal of the court to appoint counsel on petitioner's request. Just as the fact that in this capital case it was necessary that the trial court see that petitioner had counsel, so was it all the more necessary that petitioner's counsel below have sufficient time to prepare for trial. The question of continuance is traditionally said to be within the discretion of the trial judge, but this Court has often reviewed that discretion, looking to "the circumstances present in every case."

*Ungar* v. *Sarafite*, 376 U. S. 575 (1964). In this case, in the six days before trial, seven additional witnesses were added to the information, bringing the total number of witnesses endorsed by the prosecution to over seventy. Furthermore, there was in fact important additional evidence, which petitioner's counsel was not able to discover before trial, showing that petitioner was in fact materially prejudiced by the denial of the continuance. This additional evidence, going to the possibility that responsibility for a crime committed by someone else was being deliberately charged against petitioner, is set out in pages 271-374 of the Record and was cursorily treated by the Kansas Supreme Court (R. 523-24; App., *infra*, pp. 41a-42a). It is true that a defendant's attorney can always argue before trial that he should have a continuance to seek additional evidence, but the argument carries extraordinary weight when the offense is capital and the evidence against the defendant is as complex and as circumstantial as in this particular case.

These two considerations, together with the delay in appointment of counsel to represent petitioner, show an abuse of discretion by the trial court constituting a violation of due process of law.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Respectfully submitted,

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August 1967

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Petitioner's attorneys wish to acknowledge the assistance of Mr. John Townsend Rich, second year student at Yale Law School, in preparation of this petition.

# APPENDIX

No. 44,291

STATE OF KANSAS,

*Appellee,*

v.

WILLIAM FREDERICK ZIMMER,

*Appellant.*

## Syllabus by the Court

In an appeal by defendant from convictions of kidnaping in the first degree, with bodily harm inflicted, and of murder in the first degree, the record is examined, and it is *held,* under the facts, conditions and circumstances, and for reasons set forth at length in the opinion, the judgment rendered and sentences imposed against defendant must be affirmed.

Appeal from Shawnee district court, division No. 2; MARION BEATTY, judge. Opinion filed April 8, 1967. Affirmed.

ELWAINE F. POMEROY, of Topeka, argued the cause, and EMERSON M. POMEROY, of Topeka, was with him on the brief for the appellant.

ROBERT D. HECHT, county attorney, argued the cause, and ROBERT C. LONDERHOLM, attorney general, was with him on the brief for the appellee.

The opinion of the court was delivered by

HARMAN, C.: William Frederick Zimmer was convicted of the offenses of kidnaping in the first degree, with harm inflicted (K. S. A. 21-449) and of murder in the first degree (K. S. A. 21-401). As punishment the jury imposed the death penalty for the kidnaping charge and life imprisonment for the murder. The trial court denied appellant's motion for new trial, and adjudged sentences in accordance with the jury verdict, from which defendant Zimmer has appealed.

The charges grow out of the abduction and slaying of Gladys Cora Johnson, a Negro girl aged seven years.

Appellant Zimmer's contentions of error will, so far as practicable, be dealt with chronologically.

The first contention is based on the failure to appoint counsel for appellant during a particular period of time. To avoid possible misunderstanding in this area, certain background facts should be stated although all are not directly pertinent to the precise error asserted.

The offenses allegedly occurred on Saturday, November 14, 1964. Appellant, forty years of age, a resident of Kansas City, Kansas, was arrested about 9:00 p.m. on Sunday, November 15, at Marysville, Kansas. At the time of this initial apprehension he was advised by an agent of the Federal Bureau of Investigation of his right to have the services of an attorney and to consult with anyone else he chose. He indicated his understanding of his rights and no complaint is made as to the character of advice given. Later the same night and prior to the time he was brought by police to Topeka appellant told his brother-in-law, a resident of Marysville, to call appellant's wife and have her get a lawyer for him. Appellant was brought to Topeka

house. He doesn't know how far distance it was from the initial point where he said he had the little girl with him.' Said, 'This school house would either be a red or a buff, some color like that. It was not a white. Anyway it was an off shade he described it.' He said, 'It was on a graveled road on an upland grade sort of and in describing this school house,' he said, 'The inner door has a lock on it.' He said, 'By the inner door he meant it was an alcove or foyer, whatever you want to call it where the students go hang their coats up on the outside. There was hooks there.' He says, 'He remembers getting out of the car and walking into this foyer. The little girl is still in the car right at this time. He was scared and hunting a place to hide.' This is what he said at this time. 'He comes back out,' he said, 'And gets in his car and goes west and possibly north again. He doesn't know how far. And he comes to a field. He describes this field as being a field where you turn in off of a graveled road,' and he said, 'As you turn in,' he said, 'There's a dry wash in the right-hand side. This dry wash is bordered with trees.' He said, 'It's a winding dry wash.' He said, 'And I drove clear to the end of it where you couldn't be seen from the road.' He said, 'There was a small terrace right next to this dry wash,' and at this time he was asked if there was a machine made or a natural terrace like they do make in fields. He said, 'He thought it was man made, but he wasn't certain. He described this field.' He said, 'This field was sloped a little bit and it was either alfalfa or wheat in this field other than the tree lined dry wash.' He said, 'He next remembers that he looked over at the little girl and she was still sitting here in the front seat. He

takes a drink of whiskey, leaned back in the seat and this is the last he remembers until he wakes up.' He says, 'He don't know how long it is. He don't know what time he got there, but then he wakes up and on wakening,' he said, 'It's getting dusk. That the sun is in his eyes and the little girl is not in the front seat, but he looks back and the trunk lid is up. He gets out of the car and walks to the trunk lid and the little girl is laying inside the trunk.' He said, 'By looking at her, the wounds and the blood about the head and her body was cold,' he said, 'It was getting cold. That he knew that she was dead.' He said, 'He picked her up. She had on a pink dress.' He said, 'He picked her up and took her to the terrace that he was parked beside on the dry wash there and laid her on the back side of the terrace on this dry wash that bordered this dry wash.' He was asked at this time, Major McKinney asked him at this time if he had sexually molested the little girl, and he said, 'I don't know.' He said, 'But the tests will show when they find her.' He was asked if she had any clothing on and he said specifically at this time, 'That she had the pink dress, but he could not tell, he could not remember whether she had any undercloth-ing on or not.' He was asked again if he had molested her at any time. He said, 'He did remember slapping her, in the area north of town because she was crying.' Also at this time he was asked again about the hatchet. He said, 'That the hatchet that he was shown the day before did look like his hatchet. He had one like it in other words.' He said, 'But he don't know how it got in the car. He thought it was home in his garage.' He says—oh, at this time also he said, I believe he said, 'That his lawyer was going to be mad at him for talk-

the early morning of Monday, November 16. On the same day while in jail in Topeka, he was consulted by an attorney from Kansas City, Kansas. It appears this consultation was the result of the request relayed to his wife.

On November 19 the judge of the city court of Topeka, the examining magistrate upon the charges filed, in accordance with custom in Shawnee county in all felony cases, appointed Mr. Sam Crow, a practicing attorney at Topeka, counsel for appellant. This appointment was for the purpose of preliminary examination which was held November 25, at the conclusion of which appellant was bound over for trial to the district court of Shawnee county. On December 21 appellant filed in the latter court an application for the appointment of an attorney. This instrument was as follows:

"APPLICATION FOR APPOINTMENT OF COUNSEL

"Comes now the defendant and applies to the Court for the appointment of counsel to represent him in the District Court of Shawnee County, Kansas."

On December 23 Mr. Crow was appointed by the district court to represent appellant upon the hearing of the application. Hearing was held December 29 before the judge of the division then in charge of the criminal docket. At the hearing appellant offered no evidence in support of his application, choosing to rely on the written request. The district court then directed that appellant be examined under oath by the prosecution, which was done. In substance appellant testified he was employed as an engineer by the Union Pacific Railroad Company at a gross salary of about

$300.00 every two weeks; that his wife was employed by the same company at a salary of about $400.00 per month; that he owned jointly with his wife his home in Kansas City, Kansas, of a value of about $10,000, furniture, and a 1954 Plymouth, and that his wife owned a 1958 Volkswagen, all free of indebtedness; that he had approximately $2,000.00 on deposit with the railroad credit union, about $800.00 in a bank account, and government bonds in an amount between $250.00 and $500.00; that after these criminal charges were filed he gave a power of attorney to his wife permitting her to transfer title to the property; he testified he did not know what the purpose of any transfer was, that his wife "asked for my cooperation on it and that's what I did."

Appellant further testified he had not contacted any attorney and no attorney had refused to represent him. The prosecution introduced income tax records showing that for the year 1962 appellant had wages of $9,360.24 and his wife $5,154.80, and for the year 1963 appellant had wages of $8,448.74 and his wife $5,137.40.

Based upon the foregoing the court found appellant was not indigent and was able to employ counsel of his own choosing, that appellant had made no effort to employ counsel and there was no evidence any counsel had refused employment, and the court on December 30, 1964, denied appellant's application.

Although the record proper does not so disclose, we are advised by the prosecution in its brief, and it is not controverted, that on the next day following this decision appellant's wife filed suit in the district court of Wyandotte county, Kansas, against appellant asking for divorce and division of property; the county attorney of Shawnee county attempted to intervene in the divorce action for the purpose of having a portion of the marital property set

aside to defray the expense of appellant's defense in this case; this attempted intervention was denied.

Commencing with the January, 1965, term of court the judge of the second division of the Shawnee county district court assumed charge of the criminal docket and subsequent proceedings herein have been in that division.

On January 25, 1965, the court appointed a commission of three doctors to examine appellant's mental condition. On January 28, 1965, the commission reported it found appellant "not insane, an idiot, and/or an imbecile, and is in our opinion able to comprehend his position and make his defense in the cause now in hearing."

On February 2, 1965, the court held a hearing on its own motion to determine whether counsel should be appointed to represent appellant. The court found appellant did not have counsel of his own choosing and had not employed counsel and further, that appellant had advised the court he did not intend to employ counsel. Thereupon the court appointed as counsel for appellant Mr. Elwaine F. Pomeroy, a practicing attorney at Topeka. Trial commenced March 15, 1965.

As stated, appellant filed his request for the appointment of counsel December 21, 1964; the initial application was denied and it was not until February 2, 1965, that counsel was appointed for him. It is upon the December failure to appoint counsel and the consequent absence thereof during this six week period that appellant bases his first contention of error. He asserts he was entitled to assistance of counsel at every stage of the proceedings and that this right was denied him during the period between December 21, 1964, and February 2, 1965.

There is no question under both our state and federal constitutions as to the entitlement of one accused of crime

to the effective assistance of counsel in his defense. It is now well established this entitlement extends to every critical stage in a criminal proceeding where there may be a substantial loss of advantage to the defendant, and it may not be denied one who because of indigency is unable to employ counsel. This right may be waived, provided the waiver is made voluntarily, intelligently and knowingly.

We are aware of no authority for the appointment of counsel at state expense for one financially able to employ counsel absent other compelling reasons. Our statute (K. S. A. 62-1304) makes provision for such appointment only if the accused be not able to employ counsel. It expressly authorizes withdrawal of court-appointed counsel upon knowledge that the accused or his relatives or friends are able to employ counsel. Implicitly, where financial ability is concerned, our decisions have limited the benefits of the statute to indigents.

Our statute for appointment of counsel is similar to Rule 44 of the Federal Rules of Criminal Procedure. In administering this rule the federal courts have held one who is financially able to employ counsel is not entitled to have counsel assigned by the court (see 4 Barron Federal Practice & Procedure, Rules Edition, § 2461).

Appellant was of mature age, competent, with full opportunity to contact counsel (it is not contended otherwise), and he had substantial monetary resources. The guarded nature of his written application for counsel is patent, no reason being given for the request.

We would not undertake to prescribe financial standards of eligibility for appointment of counsel which would be applicable to all offenses in all districts under all conditions. These might well vary dependent upon the particular circumstances. Suffice it to say here we think the

trial court in December acted properly in refusing to appoint counsel upon the showing made. Appellant argues if counsel should have been appointed in February, counsel should have been appointed in December. This does not necessarily follow. Appellant was shown not to be an indigent in December—the record contains no showing on the subject in February and the propriety of that appointment is not an issue.

It should be noted this was not a request for counsel made before an interrogation phase of a criminal proceeding where the relationship of the financial condition of an accused to the scope of the right involved might be questioned. Nor is there any showing that in the interim period when appellant was without counsel there was any critical proceeding had, plea taken, incriminating statement made or defense lost, or of prejudice of rights in any way. Appellant merely speculates something more favorable to him might have developed had he had an attorney. Nor does the fact that a sanity commission was appointed and acted during the interim when appellant was without counsel present any basis for relief (*State* v. *Andrews,* 187 Kan. 458, 357 P. 2d 739, cert. den. 368 U. S. 868, 7 L. ed. 2d 65, 82 S. Ct. 80). This contention of error may not be upheld (see *State* v. *Lee,* 197 Kan. 463, 419 P. 2d 927, cert. den. February 13, 1967, —— U. S. ——, 17 L. ed. 2d 797, 87 S. Ct. 900).

Appellant's next contention of error involves a pill taken from him by police officers at the time of his arrest and which came into custody of the Kansas Bureau of Investigation. Allegedly the pill was of a type appellant had procured from a layman at his employer's first-aid station and which he had been taking for the purpose of curbing his appetite in a weight reduction effort. On March 9, 1965,

appellant's counsel orally requested the court to order the bureau to make an analysis of the pill, indicating he had previously understood through a Topeka police officer such an analysis would be made. The principal reason advanced for the request was to save the state the burden of expense of private laboratory analysis. The prosecution opposed the request. The court took the matter under advisement until the following day when it heard the matter further. Additionally counsel indicated a time factor in getting the pill analyzed privately. The court denied the request. In making its ruling the court remarked:

> "The Court: All right. The County Attorney is completely in charge of the prosecution of this case for the state. And no policeman has any authority to make any commitment he will do anything for you in preparation of your defense. Regardless of what some policeman may have intended to do, the County Attorney obviously has no intention of making an analysis of some pills. And I am satisfied that he is not required to. I am satisfied that if you think the pills have any relevancy to the lawsuit and want them analyzed for use by you in the defense of this case that you are going to have to do it yourself.
>
> . . .
>
> "The Court: There is no valid agreement to have the pills analyzed and they're not about to have the pills analyzed. You can't make an agreement with a policeman even if he is an official in the police department that he is going to do something to help you prepare the defendant's case for trial. The County Attorney is the one in charge of this case and I don't believe the County Attorney has made any commitment to you,

there is no evidence that he has. That will be my ruling. If you want them analyzed you will have to analyze them yourself. That's my best judgment.

. . .

"The Court: I mean [you] have to have them analyzed yourself."

Assuming relevance of an analysis of the pill (which appellee does not concede upon the showing made) we see no reason to declare it was essential that such analysis be made by a state law enforcement agency rather than by private individuals or agencies. The record affirmatively reveals that counsel for appellant was aware he might have the pill analyzed at public expense if he desired to do so. It also reveals this is not an instance of suppression of evidence by the prosecution. Counsel was never denied inspection or custody of the pill nor did anyone allied with the prosecution do anything to prevent him from having his own analysis of the pill made. The record further reveals counsel had other pills of the same kind which he had previously secured at appellant's home; we cannot tell whether or not these were ever analyzed.

At most the matter lay in the sound judicial discretion of the trial court and we see no abuse thereof in the ruling made.

On March 11, 1965, the state filed a motion to endorse the name of an additional witness on the information pursuant to K. S. A. 62-802. The same day counsel for appellant was orally notified of the requested endorsement and was given the name and address of the witness and a summary of her expected testimony. Hearing was had on the motion March 12 and, over objection, the request was

allowed. The witness was a clerk in a liquor store in Wamego whose trial testimony was very incriminating to appellant.

As stated, trial commenced March 15. It appears the investigating police officers took a statement from the witness as early as some time in November; the county attorney knew of her existence but first interviewed her March 11.

Appellant assigns the ruling permitting the endorsement as error.

K. S. A. 62-802 provides in pertinent part the prosecuting attorney shall endorse on informations filed by him the names of witnesses known to him at the time of filing and, in addition, names of other witnesses who afterward become known to him, at such times before trial as the court may prescribe. The statute is designed to protect a defendant against being taken by surprise at the trial. In applying it this court has consistently held such endorsement, even during trial, rests within the sound judicial discretion of the trial court and that, where permitted, material prejudice to the rights of the defendant must be clearly shown before it constitutes reversible error (see *State* v. *Poulos*, 196 Kan. 287, 411 P. 2d 689, cert. den. October 10, 1966, 385 U. S. 827, 17 L. ed. 2d 64, 87 S. Ct. 63).

We think no such abuse of discretion is shown. Counsel for appellant was notified four days in advance of trial as to the witness and the expected testimony. The record discloses counsel did interview this witness prior to the commencement of trial; it is not shown how, by reason of the late endorsement, there was any disadvantage to appellant or how there would have been greater safeguard for his rights by reason of an earlier endorsement. In arriving

at the conclusion reached we do not overlook counsel's request for continuance, to be discussed next.

At the conclusion of the foregoing hearing on March 12, the following occurred:

> "Mr. Elwaine Pomeroy: We would respectfully move the Court for at least a one week's continuance in the trial of this case so as to allow us to adequately prepare for the defense."

The court denied the motion, which ruling is assigned as error.

K. S. A. 62-1414 provides that continuances may be granted in criminal cases for like causes and under like circumstances as in civil cases. Continuances in civil cases are governed by K. S. A. 60-240(*b*) which provides:

> "The court may for good cause shown continue an action at any stage of the proceedings upon such terms as may be just. . . ."

And K. S. A. 60-240(*c*) provides the granting of continuances in all cases shall be discretionary. This latter proviso is in harmony with long-standing case law.

In *State* v. *Hickock & Smith,* 188 Kan. 473, 363 P. 2d 541, appeal dismissed 373 U. S. 544, 10 L. ed. 2d 688, 83 S. Ct. 1545, this court stated:

> ". . . the matter of a continuance in a criminal prosecution is largely within the discretion of the trial court and . . . its ruling thereon will not be disturbed unless it has been made to appear that such discretion has been abused to the prejudice of substantial rights of a defendant." (p. 482.)

(See, also, *State* v. *Latham & York,* 190 Kan. 411, 375 P. 2d 788, cert. den. 373 U. S. 919, 10 L. ed. 2d 418, 83 S. Ct. 1310.)

We think appellant's assertion of error is not well taken. Appellant's counsel, after his appointment February 2, 1965, assisted by his brother who is a practicing attorney in partnership with him, spent a total of approximately 330 hours in preparation for trial, including investigation, research and interview of all witnesses who testified at the trial. The record of trial reflects this massive preparation. It reveals industrious, zealous, competent and resourceful advocacy in behalf of appellant. Moreover, at the time the motion for continuance was made, no particular reason therefore was advanced, that is, good cause was not shown, and later, upon hearing of the motion for new trial, no showing was made, as it might have been, as to how or in what manner appellant was prejudiced by the denial of the continuance. Again appellant simply speculates that with more time something more favorable to him might have been procured; this is not good cause. Under all the circumstances no abuse of discretion is shown.

Appellant next contends he was denied due process of law in that the state legislature which at its 1955 session added the death penalty to our kidnaping statute (Laws, 1955, Chap. 193, § 1) was improperly apportioned and hence its acts were not valid.

This contention has been answered adversely to appellant in *State* v. *Latham & York,* supra, wherein it is said:

> "Assuming that the legislature has failed to effect a new apportionment of the districts of its members as required by Art. 10, Sec. 2, nonetheless the acts of such legislative body would be those of a *de jure* legis-

lature and the members thereof are *de jure* officers. All the reported decisions sustain the proposition that the fact a legislature has not reapportioned in accordance with the state constitution does not preclude it from making any law or doing any act within the legislative competence. [p. 426]

. . . .

"The question of the failure of the legislature to reapportion itself in accordance with the mandate of Art. 10, Sec. 2, could have no possible bearing upon the validity of the defendants' convictions." (p. 427.)

The remaining specifications of error involve trial rulings, requiring review of the evidence which is summarized as follows:

PROSECUTION EVIDENCE

Betty Michael, who lived at 915 North Taylor in Topeka, the mother of Gladys Cora Johnson, aged seven, last saw Gladys alive at home about 7:30 Saturday morning, November 14, 1964, prior to leaving for work at a cleaning shop; Mrs. Michael had made arrangements for her three children to stay with a Mr. Eatmon at the Eatmon home at 1335 North Taylor until her return from work; the mother next saw Gladys' body a week later at a funeral home.

At about 8:00 a.m. a neighbor who lived across the street from the Eatmon home took her dog out in the yard; she noticed three Negro children inside the Eatmon yard—two girls and a boy; she went back inside her home and very quickly thereafter a little Negro boy and girl came to her front door crying and screaming; the boy, who was the six

year old brother of Gladys, said, "Lady, call the police. A white man took my sister and went that away." The boy said the man was in an orange car. The neighbor called the police.

On Saturday morning, November 14, an air force sergeant stationed at Forbes Air Force Base was going hunting north of Topeka; while traveling south on the Brickyard road northwest of Topeka looking for a place to hunt he noticed a car parked in a field about a thousand feet west of the road; he drove over along the side of the car which was a 1954 Plymouth, color light over dark brown; a white man and a small Negro girl were in the car; he had a brief conversation with the man about hunting; the man stated the property belonged to the Browns and that he had permission to hunt; the sergeant noticed the little girl was crying and whimpering; he spoke to her but she did not respond; the Plymouth automobile bore a Wyandotte county license tag which number the sergeant wrote down; he went to a nearby house where he was told the property did not belong to Browns; he returned to the field but no one was there; he went back to the house and at about 9:00 a.m. telephoned the sheriff's department about the incident; later he identified photographs of appellant's automobile as showing the same vehicle he saw in the field; on November 15 he identified photographs of Gladys Johnson as being pictures of the girl he saw in the car, and, out of a group of sixteen, he identified two photographs of appellant Zimmer as being the man he saw in the field; on November 16 he identified appellant from police lineups as the person he saw in the field and at the trial he identified appellant as the same man.

The license tag number jotted down by the sergeant was identified as being registered in the name of William F.

Zimmer, 1872 North Thirty-First Street, Kansas City, Kansas, for a 1954 Plymouth sedan.

Sometime between 12:00 noon and 12:30 p.m. on November 14 a clerk at a liquor store in Wamego, Kansas, noticed a car with a white top and a dirty pink or salmon body parked at the curb in front of the store; a white man and a small Negro girl were in it; the girl was staring straight ahead and did not move; the man went into a cafe next door and returned carrying a brown paper bag; as the car drove away the clerk noticed it bore a Wyandotte county tag; at about 1:15 p.m. the same car returned with only one person in it and parked in the store driveway; the driver came into the liquor store and conversed with the clerk about hunting; the clerk testified there were blood stains on his right arm and dry clotted blood around his fingernails; she noticed a "... very odd odor. It was something that I—I can't describe—something like a wild, not wild, but a fresh killed something I don't know."

The clerk identified photographs of appellant's car as similar to the car she saw; she identified appellant as the man she had seen with the Negro girl and who later came back to the liquor store.

On Sunday, November 15, the Topeka police department telephoned the police at Marysville, Kansas, that a kidnaping charge had been filed against appellant and requested his apprehension.

Appellant was arrested about 9:00 p.m. that evening in Marysville by local police and taken to the Marysville police station where an agent of the Federal Bureau of Investigation interviewed him; two bottles of whiskey were recovered from him; appellant appeared to have been drinking but was not drunk; at the time of the initial arrest the

officers were looking for Gladys who had not yet been found; appellant's car was in Marysville; the FBI agent asked appellant, "Would you mind if we looked into your car?", to which appellant replied, "I don't mind at all. You can look at anything I have"; appellant further stated, "You can search anything I have. I have nothing to hide"; appellant also replied to another police officer when asked about looking into his automobile: "Be my guest. Do what you want to with it," that he "had no objection."

Two Marysville police officers, accompanied by appellant's brother-in-law, took appellant's car keys, went to his car, unlocked it, and looked inside it and the trunk; the officers were told by the FBI agent to look for Gladys Johnson—that was their principal objective; the officers examined the trunk by flashlight and saw red stains on some newspapers, on a shallow box and on a white cloth covering a shotgun; they saw nothing else unusual and did not notice a hatchet; their only purpose in looking in the trunk was to see if there was a girl in it; nothing was removed from the car.

The FBI agent advised appellant of the kidnaping charge and, in the presence of his brother-in-law, advised him of his constitutional rights and "made sure that he understood them himself"; he advised appellant he did not have to make a statement, that any statement he made could be used against him and that he could consult an attorney or anyone else; the advice was repeated and appellant reiterated that he understood; appellant gave the agent a statement as to his whereabouts on Saturday, November 14.

Later, while still at Marysville, appellant gave a similar but more detailed statement to a Topeka police officer; he

stated after getting off work on Friday, the 13th, he had purchased shotgun shells and whiskey in Kansas City; after arriving in Topeka he purchased more whiskey and visited various beer taverns, drinking beer and whiskey; later he did some drinking with a woman and man whom he did not know; the next thing he remembered was waking up alone Saturday morning a block south of the North Topeka fire station; he took a drink and drove west, stopping at Silver Lake around 7:00 or 7:15 a.m. to telephone his brother-in-law at Marysville to go on hunting as he would not be able to get there; then he went to Manhattan, stopped on the west side of Tuttle Creek lake, then went on toward Concordia, hunting pheasants on the country roads near there; he shot two and put them in the car; later he threw them away near Clifton; he went to Hanover, then called a lady friend at Marysville, picked her up and then went to a motel at Washington where he spent the night; the next day, Sunday, he and his lady friend spent the day on the side-roads hunting pheasants but did not see any; after taking her home he went to find his brother-in-law who informed him the police were looking for him.

Early Monday morning appellant was taken by Topeka police to the Topeka jail; before he left Marysville he telephoned his brother-in-law and requested that he call appellant's wife and tell her he was going to Topeka and to get him a lawyer.

Late Sunday night or early Monday morning appellant's car, which had been locked up, was towed to Topeka where it remained in continuous police custody.

On Monday, November 16, an attorney from Kansas City, Kansas, consulted privately with appellant at the Topeka city jail.

On the same day a search warrant for appellant's automobile was obtained and a copy served on appellant; the car, which had been kept locked, was thoroughly searched by the laboratory supervisor of the Kansas Bureau of Investigation and the contents removed and invoiced; when the trunk lid was opened the handle of a hatchet was visible but the entire hatchet was not, it being behind the spare tire; there was a reddish substance on the hatchet; visual observation disclosed the presence of hair on the hatchet; because of several stated reasons no attempt was made to take fingerprints from the hatchet; among items removed from the automobile were the hatchet, a piece of newspaper, a cardboard box, a pair of undershorts and a pair of trousers containing a white handkerchief which was not touched so that any evidence would not be disturbed, a pair of dress shoes and sweepings from the right front floor of the automobile; the custody and transportation of these items were traced to FBI laboratory examiners at Washington, D. C.

On Tuesday, November 17, after appellant had been visited by a lawyer and his wife, he was further questioned by police, one of whom testified:

> "So at this time the Defendant says, 'Well, I do remember being in the pasture north of town with a little colored girl and she was crying.' And Major McKinney told him go ahead. At this time he asked him if he remembered anyone coming around the automobile anything other than him and the little colored girl being in the area north of town. He said, 'No, he didn't remember anybody else. The next thing he remembers,' he says, 'He went west and possibly a little north on gravel roads. He arrived at a school

ing to us.' But he said, 'Then he left the field and he drove some more. . . ."

The officer further testified appellant stated he went to Wamego, then toward Marysville stopping occasionally to remove bloody papers from the car trunk and hide them in culverts and grass; that around 9:00 p.m. he arrived at his brother-in-law's house at Marysville; his brother-in-law informed him the police were looking for him—he told him "Okay, he would head back for Kansas City", but he went west; near Hanover Junction he threw away the rubber mat from the trunk of his car and fired his shotgun twice to substantiate his story about shooting pheasants; then he went to Hanover to call his Marysville lady friend with whom he had a few drinks and later spent the night at a Washington motel; the next day he spent hunting the side roads for pheasants; he took the lady home that evening and was later arrested at Marysville; appellant stated he wanted to go and help find the little girl's body.

The following day, Wednesday, November 18, appellant went on the search for the girl's body but he appeared to have trouble finding the field although he described it in detail; on Saturday, November 21, a hunting party found the dead body of Gladys lying on a creek bank in a rural area about four miles northwest of St. Marys, Kansas.

The Shawnee county coroner, a physician and surgeon specializing in pathology, examined the body at the scene where it was found; the body was clad only in a pink dress and was frozen; there was only a small amount of clotted blood under her head; based upon his examination of the body and the ground under it he was of opinion she was not killed there but was dead not more than thirty or forty minutes when placed there; the doctor performed an

autopsy; there were two large crushing blows on the head, which shattered the skull; there were four deep wounds with ragged edges across the neck and shoulder, one of which fractured the spinal vertebrae and spinal cord; death was caused by the blows to the head and spinal vertebrae, any of which would have been fatal; the head wounds could have been caused by a blunt instrument such as a rock, tire iron or hatchet; the neck and shoulder wounds could have been made with the cutting edge of a hatchet such as the one found in the trunk of appellant's car; the wounds were made by a chopping type blow; there was no evidence of trauma to the vagina and evidence of sperm could not be isolated in the vagina, rectum or mouth.

Additionally, there were sent to the FBI laboratory the following: A small sample of Gladys' blood, hairs from her head, her pink dress, and a pair of white coveralls worn by appellant while he tried to cut his wrist at the Topeka jail.

A chemist at the FBI laboratory whose work consisted of examination of body fluids including blood, testified as a result of his examination of the various exhibits heretofore mentioned that the stains on the cardboard box and the piece of newspaper were blood stains of human origin; that corresponding spots on the trousers and the undershorts were blood of human origin; he was unable to determine the blood grouping of the foregoing; that the trousers, undershorts and pink dress were negative for evidence of semen; he identified stains on the handle and blade of the hatchet as being blood stains of human origin, the blood belonging to group O; there were possible blood stains on both dress shoes but this was not definite, nor was it possible to determine origin; the sample of Gladys' blood was identified as belonging to blood group O; a quantity of

blood on the coveralls could not be typed definitely as to grouping because of the fabric of the coveralls.

A hair and fiber examiner at the same laboratory testified as to his examination; he explained in considerable detail that hairs of the three races, Caucasian, Negroid and Mongoloid, can be separately identified and within each race hairs may be further examined microscopically with magnification up to 900 times so that approximately twenty-one separate characteristics or points of identification may be made for the purpose of hair comparison; he described hair composition and the method of analysis; the sweepings from the front floor of the automobile contained both Caucasian and Negroid hair; there were three short Negroid hairs adhering to the reddish substance on the hatchet; the handkerchief in the trousers' pocket contained two fragments of Negroid hair possibly 1/16th to 1/32nd inches long; all of these hairs as well as the known samples of hair from Gladys' head were analyzed and all possessed the same twenty-one characteristics or points of identification; the witness was of opinion there was only a remote possibility that the hairs in the sweepings, the handkerchief and on the hatchet came from any person other than Gladys Johnson.

### Defense Evidence

Appellant testified in his own behalf. He described his family and work background; he stated he did drink and since he had quit smoking he had had a weight control problem; to control his weight he obtained some pills from a fellow employee which he had been taking one in the morning and one in the afternoon off and on for a period of three or four years; in August of 1963, in Kansas City,

while en route to the post office in his automobile he was cursed by some children who were blocking the street, with the result he argued with a child's mother and several days later was arrested on a child molestation charge; this charge was later dismissed; his only other arrests were for peace disturbance and running a stop sign; in January, 1964, he was arrested but the only thing he remembered was getting up from the supper table and waking up next morning in jail.

On Friday, November 13, 1964, appellant got off work at 3:30 p.m. and after doing some chores and buying some ammunition and a half pint of whiskey he started for Marysville where he had arranged to go hunting; around 8:30 p.m. he stopped at Topeka to get more whiskey and then went to three beer taverns where he spent the evening; he met a woman from Phillipsburg and then a man with whom he drank; before midnight he went to the bus terminal but was hazy about what happened thereafter; he thought he went back to the taverns but was not clear; he had a hazy remembrance of going to a colored barbecue tavern in North Topeka; the next thing he remembered was waking up in his car Saturday morning south of the fire station; there was another fellow lying in the back seat; he had not seen this man before; each of them had a bottle; the man indicated appellant had promised to take him to Manhattan; appellant took a drink and started out; at Silver Lake he took another drink and he telephoned his brother-in-law to go on hunting; the other fellow started driving and appellant got in the back seat of the car; he further testified;

"Q. What do you next remember?

"A. Next thing I remember is urinating by the side of the car, and I looked around, and the rear door

was open, and the trunk lid was open about that much. And this pasture was not the pasture that the Airman seen me in, but a pasture that had a pond in it, and this pond was, oh, an eighth of a mile away from the car, but beyond this pond was a house that you could see from where the car was parked. Now that's the pasture that I was in. And in the trunk was this poor little girl with her feet sticking out of the trunk about a foot.

"Q. What did you do?

"A. Well, I pushed them in the trunk and closed the lid then got in the car and drove off. This is in the pasture. I had to let myself out through a gate to get out of it, and I stopped and opened the gate, drove out and closed the gate because there was stock in the pasture.

"Q. And then what did you do?

"A. I drove around. I don't know just what direction I was driving in, thinking what happened to me, and I was—what am I going to do with this body, and I stopped at this school house, in the school. And the school house we found later was white, but I thought it was colored. It was tan colored school house. I got out and walked around the car and into the school house foyer, and it was locked. I got back in the car and drove off and went some distance. I don't know how far, but I guess it isn't too far from this school house to this field that had alfalfa or wheat in it and drove back in there, and again I'm not clear on my directions because the detectives told me I was wrong. I drew them a map of this place. They said, 'My directions was off.' After I got to the end of this field I

took another drink and I—I must have passed out because I went to sleep. I don't remember any more until almost dark when I woke up again. That's when I got out of the car, lifted up the trunk and laid the little girl along the bank—(did not finish sentence).

"Q. What did you do then?

"A. I seen a lot of blood in the trunk on some newspapers. These newspapers I took with me to use to clean the game with they are always short of newspapers in Marysville. I don't think they take any regular newspapers. We take the Kansas City paper and had plenty of them, so I always bring some along. Well, the blood was all over these papers, so I thinking I got to get rid of those papers some way so I closed the lid, got back in the car and drove off. Now this is getting dark. It's getting sundown.

"The Court: Still Saturday?

"The Witness: Still Saturday, Sir. And the next city I remember coming into is the east edge of Wamego. So we had a difficult time finding out where this was because I didn't remember going through any other towns."

Appellant testified he did not remember being in the field where the airman saw him; the first time he saw the little colored girl she was in the trunk dead; he had no memory of seeing her alive; he had no explanation why he did not then seek help; after leaving Wamego he started scattering papers along the drainage and weeds until he got rid of them; he finally arrived at Marysville about 9:00 or 9:30 Saturday evening where his brother-in-law told him the police were looking for him; he told his brother-in-law he would go back to Kansas City; he didn't know why

the police were looking for him; he looked in the trunk with his flashlight to see if there was more blood; he saw blood on the mat so he threw the mat away; he further testified: "And I thought well they are going to want an alibi and I don't have no alibi, so I will just tell them I went hunting. So I discharged my shotgun couple times as evidence that I'd gone hunting." He then drove to Hanover, called his lady friend, bought two pints of whiskey, returned to Marysville and then went to a Washington motel where he spent the night with his friend; the next day he drove around country roads with her looking for pheasants; he did not tell her about finding the body; after eating supper he returned to Marysville about 7:30 or 8:00 Sunday evening; he got two half pints of whiskey and had just found his brother-in-law when the police arrived; he admitted the story he first related about the affair to the police on Sunday night was similar to that which the Topeka police officer testified to, and that his statement Tuesday evening, November 17, was the same as related on the witness stand by police officers; he told that story so they would not bother him any more; the officers were courteous and did not threaten him, "They use the opposite approach, the buttering-up type approach"; he didn't tell about the girl when first questioned because he "was trying to search my mind for more of the information that was lacking", ". . . I wanted time to think"; he hid the bloody newspapers to "get rid of the evidence"; later on Tuesday night, November 17, he tore the brass top of a lead pencil apart to make a jagged instrument and tried to sever an artery in his arm; he lost some blood and fainted twice; he had done this after one of the police officers told him his fingerprints were found on the bloody

hatchet and related other incriminating evidence, and that they "had it on him" and he was never going to get out; the next day he drew a picture of the field and he went with the officers to look for the body; he kept his weight control pills in the basement of his home in Kansas City; no one knew where they were; when he left Kansas City his pill bottle, which holds ten or fifteen, was more than half full.

At the time of the search of the automobile at Topeka an officer removed a pill bottle containing a pill from appellant's suitcase.

Appellant's brother-in-law, who lived at Marysville, testified appellant called him Thursday, November 12, about pheasant hunting and again on Saturday morning, November 14, saying something about having a flat tire and for him to go on hunting; appellant was supposed to be there by noon but he next saw him Saturday night about 8:30; appellant had beer breath but appeared sober; he asked appellant what he had done and appellant said nothing; he told appellant the police were looking for him; appellant said he would go to Kansas City to find out about it; he next saw appellant Sunday night, intoxicated, and again told him the police were looking for him; he denied knowing anything about the missing Negro girl; then the police came up; at the police station the FBI agent advised appellant of his rights and that he could call a lawyer if he wanted to; the brother-in-law testified as to an incident in July, 1964, when appellant was very intoxicated at Marysville just prior to a scheduled train run; he and his wife attempted to sober appellant up with black coffee; he made the run but later told them he had run the train from Marysville to Topeka before he knew anything that was

happening; after being informed appellant had tried to take his life, he visited him at the jail; appellant seemed remorseful and said he must have done it because they had found his hatchet and that he didn't want to live if he had done this thing; the little girl had not been found at this time; the witness knew of no weight control efforts on appellant's part other than the food he ate.

A Topeka tavern owner testified appellant was in her tavern the night of Friday, November 13, from about 9:30 to 11:45; he had danced and tried to "pick up" a waitress there; after he had picked up a waitress' purse, the witness refused to sell him any more beer but gave him a six-pack to go; appellant was seen talking to a man called "Sherpy" while at the tavern.

A laborer at the state printing plant was walking home from his work between 2:00 and 2:30 a.m. the morning of November 14; he saw appellant and another man in a car about two or three blocks west of North Topeka Avenue; appellant, who was drinking from a bottle, offered him a drink and asked him if he knew where he could find a "colored doll"; appellant displayed identification papers showing he was not a policeman; this was an area near the home of Gladys Johnson.

A Topeka police officer received a call about the missing girl at 8:06 a.m., November 14; he went to the neighbor's residence from where the call had come; across the street there were two small children crying, Donette and Elmer Johnson; the children told about a man in an orange and white car grabbing their sister Gladys; one said it was a colored man; the officer then telephoned the mother at the cleaning shop; soon thereafter a police search began.

Two neighbors of appellant testified he had been a good neighbor, that he had a good reputation and they had known

of no trouble; a fellow employee and former brother-in-law stated appellant had a good work record and a good reputation among his fellow employees.

A psychiatrist at the Menninger Foundation, who in January had been a member of the sanity commission for appellant, examined him in March, 1965, and testified as to the result; a complete psychiatric and psychological evaluation was made; there was no organic or neurological problem; no evidence of definite disease was found; there was no significant mental disorder and no diagnosis was made; the examination indicated a fairly stable, emotionally controlled, average individual; appellant gave a history of blackouts, all except one being associated with drinking; excessive drinking, among other things, will produce amnesia; a retrograde type amnesia could have blotted out the memory of a heinous act; drunkenness can cause loss of perception and impair judgment to handle unusual situations, depending on degree; appellant was not insane, he understood the difference between right and wrong and knew certain acts were prohibited.

A psychologist at Menninger's administered a battery of psychological tests to appellant. The tests did not reveal the presence of any tendency toward sexual perversion or much seriously wrong in terms of personality integration.

By way of rebuttal evidence for the prosecution the police officer in question denied he had told appellant his fingerprints were found on the hatchet and that he was "never going to get out."

Appellant urges as ground for reversal of his conviction that proper venue as to the murder offense was never established in Shawnee county, inasmuch as there was no evidence the killing occurred therein. He argues the state

produced evidence the victim was last seen alive in Wamego in Pottawatomie county and her body was found in Pottawatomie county; therefore the murder offense could be prosecuted only in that county.

Section 10 of the bill of rights to our Kansas constitution provides in part:

> "In all prosecutions, the accused shall be allowed to appear and defend in person or by counsel . . . and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. . . ."

This is implemented by the following statutes:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law." (K. S. A. 62-401.)
>
> "When a public offense has been committed, partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." (K. S. A. 62-404.)

And our statute denouncing kidnaping provides:

> ". . . Any person or persons charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed, kidnaped, or otherwise taken shall have been carried or brought." (K. S. A. 21-449.)

It is true as contended there was no evidence as to where the fatal blows were struck.

Appellant was charged in the information with felony murder, that is, killing while engaged in the perpetration of a felony, namely, kidnaping. The jury was instructed upon this type of murder and appellant stands convicted thereof. Hence the kidnaping was an essential element of the murder offense. Inasmuch as the initial abduction occurred in Shawnee county and the kidnaping was triable there, venue on the murder charge became permissible there under 62-404.

It may be noteworthy that the general area in Pottawatomie county where the victim was last seen alive other than by her killer and where her body was found, is so situated it lies within five or six minutes driving distance from three adjoining counties, including Shawnee, and no more than fifteen minutes from at least two others. A murderer should not escape punishment because the exact place of his crime is concealed.

The Supreme Court of Washington was confronted with an identical factual situation where the same legal contention was made as here in *State* v. *Wilson,* 38 Wn. (2d) 593, 231 P. 2d 288, cert. den. 342 U. S. 855, 96 L. ed. 644, 72 S. Ct. 81, cert. den. 343 U. S. 950, 96 L. ed. 1352, 72 S. Ct. 1044. The defendants there were convicted of kidnaping in the first degree and murder in the first degree and the death penalty imposed. The facts were that the victim was kidnaped in Clark county, Washington, and a week later her body was found in Skamania county, Washington, fifty-five miles from the scene of the kidnaping. She had been brutally beaten, cut behind her ear and sexually violated. Death was caused by carbon monoxide poisoning. The evidence did not reveal where the cause of death occurred.

The state of Washington has a constitutional provision respecting place of trial essentially identical to that quoted

from our own bill of rights and an implementing statute identical to our 62-404.

Under a statute similar to our own the defendants in *Wilson* were charged with felony murder. The court held the county wherein the kidnaping occurred had jurisdiction to try the murder charge, stating:

> "Nor does the fact that no one can say with certainty whether the death occurred in Clark county, where the kidnaping occurred, or in Skamania county, where the body was found, present any bar to the prosecution for murder in Clark county." (p. 599.)

See, also, *People* v. *Abbott*, 47 Cal. 2d 362, 303 P. 2d 730.

We hold venue on the murder charge was properly established in Shawnee county.

At the conclusion of the prosecution evidence appellant moved for his discharge upon the venue issue already mentioned and upon the ground appellee had failed to prove the kidnaping charge. Denial of this motion is assigned as error. This contention is based upon the argument there was no evidence that the girl Gladys was confined against her will.

The child was taken under such circumstances as to cause crying and screaming in her younger brother and sister, she was crying when seen in appellant's company in the field northwest of Topeka and appellant admitted to officers he slapped her because she was crying. She was found brutally murdered. The contention is wholly without merit. Moreover, as a matter of law, a child of tender years may not consent to its seizure. At 1 Am. Jur., 2d, Abduction and Kidnapping, § 16, the rule is stated:

> "A child of tender years is ordinarily regarded as incapable of consenting to its seizure and abduction

and, when taken from its rightful guardian, is deemed to have been taken without its consent as a matter of law."

The jury here was later instructed in accordance with the foregoing and properly so. The evidence was sufficient to support the charges, including the element of wilfulness, and the court committed no error in denying the motion to discharge.

Appellant next complains that the hatchet and other items taken from his automobile were obtainable as a result of an illegal search and seizure and were improperly received in evidence. He now argues he was not in his car when arrested in Marysville and the officers had no right to look into the car without a search warrant. At the time of the later minute search of the car when the articles were removed, a search warrant had been obtained. No objection was made at the trial to the reception of this evidence and in view of this, the contention might well be disposed of on the basis of the contemporaneous objection rule (K. S. A. 60-404). This rule does serve a valid purpose. However, we need not so bottom our decision. Nor need we dwell upon the proposition that a search which is a bona fide effort to save life, weighed in the scales of human values, is a justifiable invasion of privacy and does not constitute an unreasonable search so as to seal off anything within possible ambit of that effort. The record is replete with clear and convincing evidence of express, voluntary, intelligent consent by appellant to that initial search. The constitutional immunity from unreasonable searches may be waived by consent to the search.

In *Zap* v. *United States*, 328 U. S. 624, 90 L. ed. 1477, 66 S. Ct. 1277, the rule is stated:

". . . the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived." (p. 628.)

See, also, *State* v. *Emory*, 193 Kan. 52, 391 P. 2d 1013.

Appellant complains that color slides or reproductions of the victim's body were, over his objection, improperly admitted into evidence. These were pictures taken prior to autopsy after the body had been removed to Topeka. Pictures in black and white film were taken of the body at the scene where it was found. These were received in evidence without objection. It is argued the use of the color slides was needless, inflammatory and done only to emphasize the gruesome nature of the crime.

The trial court carefully previewed these slides prior to their showing to the jury and in doing so rejected some that were offered. It limited the length of their showing by projector while the coroner was testifying. The slides were used by the coroner to demonstrate depth of the wounds and type of blow inflicting them. Later, after the jury had retired for its deliberations, the slides, along with other exhibits, were, with permission of the court, taken into the jury room.

We see nothing wrong in connection with the color slides. They tended to illustrate material facts in the case. That they were gruesome merely reflected reality—the shocking nature of the killing. No error is shown in their use (see *State* v. *Turner*, 193 Kan. 189, 392 P. 2d 863). Nor do we find abuse of judicial discretion, as contended, in permitting the coroner's demonstration of the hatchet during his testimony.

The trial court excluded two exhibits offered by appellant. One was a picture of a man called Sherpy, an itinerant seen in appellant's company at a tavern Friday night, November 13. Appellant argues the photograph should have been received to show any possible facial resemblance between Sherpy and the appellant on the premise it may have been Sherpy who was seen the next day with the girl. The difficulty with the argument is there was no foundation laid nor facts shown from which such an inference could be drawn. Appellant testified the man who was with him in the car Saturday morning was a man he had never seen before. There was nothing to connect Sherpy with the abduction on Saturday morning any more than countless other men whose pictures could have been produced. It was not shown that the proffered exhibit had probative value nor is it shown here there was error in its exclusion.

The other exhibit excluded was a copy of a psychologist's report of examination of appellant. The psychologist was present in court and testified at length as a witness for appellant. Not only was he available to testify as to matters covered in the report, he in fact did so except so much thereof as amounted to sheer speculation as to whether appellant did in fact commit the crime. Statements of this nature would not have been admissible even if made by the psychologist while testifying as a witness. The ruling was correct.

Certain testimony proffered by appellant was excluded. A Topeka police officer was not permitted to testify as to the alleged request on behalf of appellant to have the pill already mentioned analyzed. We have discussed the propriety of the request so far as pretrial court action thereon was concerned. Appellant had sought to use the

request as a straw man at the trial; as evidence it was irrelevant and properly excluded.

The trial court sustained appellee's objections to three questions put to the psychiatrist. One inquired whether tests given appellant revealed any tendency toward sexual perversion. This information was, without objection, subsequently elicited from the psychologist who testified, in view of which error may not now be predicated upon the prior exclusion. The other two questions called for opinions of the psychiatrist touching upon the possibility of whether or not appellant had in fact done the killing. The witness himself conceded any answers he might give would be in the realm of sheer speculation. Their purely conjectural nature is further shown in his affidavit filed upon motion for new trial embodying testimony he would have given. Opinion evidence as to physical or mental condition based upon reasonable medical certainty or probability is permissible. Such expert testimony is admitted as being based upon generally recognized and established scientific principles. The opinions sought here admittedly were not of that character. The trial court did permit a wide range of inquiry into appellant's mental condition and the psychiatrist testified at length as to that. However, the testimony sought lacked scientific basis to support it beyond the realm of mere possibility and was so conjectural as to lack probative value. The court committed no error in sustaining the objections.

Appellant contends the court erred in failing to instruct the jury on the lesser offense of murder in the second degree as requested. The trial court considered this proposition in a well-reasoned memorandum made part of the trial record, ruling in effect appellant was either guilty of

first degree murder as charged or not guilty of any degree of homicide. We approve the action taken.

Murder in the second degree is murder committed purposely and maliciously, but without deliberation and premeditation (K. S. A. 21-402). What is commonly referred to as felony murder is defined as any murder committed in the perpetration or any felony (K. S. A. 21-401). Appellant was charged with this type of murder, the felony being kidnaping in the first degree (K. S. A. 21-449), a crime involving violence, either actual or threatened. The defense was two-fold: That appellant did not commit the acts, or if he did, he lacked the requisite intent by reason of his state of unconsciousness from drinking.

In *State* v. *Kornstett,* 62 Kan. 221, 61 Pac. 805, the defendant was convicted of murder in the first degree. The information in effect charged felony murder. The defendant attempted to ravish the victim, then choked and beat her, struck her head against a tree and threw her in a well twenty feet deep. The wounds inflicted caused death. The trial court refused to instruct on any lesser degree of homicide. This court stated:

> "The charge of the court should be applicable and limited to the facts in evidence, and where the testimony shows beyond question that the defendant was either guilty of murder in the first degree or innocent of any offense, it is unnecessary to charge the jury as to any degree of the offense other than murder in the first degree." (Syl. ¶ 7.)

In *State* v. *Clough,* 70 Kan. 510, 79 Pac. 117, this court said:

> ". . . it is not error for the trial court to omit instructing the jury as to any one, or all, of such lower

degrees of crime included in the charge, when the evidence tends to establish the highest degree of crime charged and does not tend to establish guilt of any lower degree of crime included therein." (Syl. ¶ 1.)

In *State* v. *Roselli,* 109 Kan. 33, 198 Pac. 195, the defendant and a companion held up a store. While the robbery was in progress, the companion killed the storekeeper. Defendant was charged with murder in the first degree. The defense was an alibi. The court refused defendant's request to instruct on second degree murder. Defendant's first degree murder conviction was affirmed. This court stated that killing in perpetrating certain felonies of violence is the statutory equivalent for the deliberation and premeditation essential to murder in the first degree, and further that, if defendant was present when the crime was committed, he was engaged in a robbery and the elements of deliberation and premeditation, which must be utterly absent in second degree murder, were incontestably present.

In the case at bar neither side produced evidence from which it can be said or inferred that appellant did the killing purposely and maliciously but without deliberation and premeditation. If it could be conceded there were any such evidence, appellant still would not be entitled to the instruction sought. Kidnaping, which involves the detention of another, is a continuing offense. The kidnaping could not be deemed to have been terminated or abandoned at the time of the killing so as to reduce the gravity of the homicide. The conclusion is inescapable the killing was committed during the perpetration of the kidnaping. Appellant was either present in the course of the kidnaping when the killing occurred (and mentally responsible) and

guilty of first degree murder, or he was not present and, therefore, not guilty of any degree of homicide. To have given the instruction on the lesser offense would have permitted the jury to speculate on a degree of homicide not in the case upon any theory.

Appellant's complaint as to the initial failure of the transcript to reflect that in reading the instructions to the jury the trial court stated all possible verdicts which might be rendered has now been satisfied by a correction to the transcript by the official court reporter. It appears the jury was correctly informed by the court, both orally and in written instructions submitted to it, as to all possible verdicts in the case including verdicts of not guilty, and not guilty by reason of insanity, as to both charges.

Appellant urges that the sentences imposed by the jury are inconsistent, repugnant and impossible to carry out. The specious argument that execution of the capital sentence destroys the effect of the sentence to life imprisonment warrants little comment. The jury was instructed to consider the offenses separately, which it manifestly did. Each sentence was legal and within the jury's competence to impose and each may be lawfully executed as adjudged.

Appellant urges error in the overruling of his motion for new trial. As grounds, in addition to that which has already been discussed, he asserts insufficiency of evidence to support the findings of guilty. We need not labor the matter. Forty-eight witnesses testified and over fifty exhibits were received in evidence. The seven year old victim was abducted. Soon thereafter, appellant was seen alone with her in a field near Topeka and later in the city of Wamego. Identification was positive. The girl was hit and chopped to death with a weapon found in appellant's

automobile. There were other incriminating circumstances, including appellant's admissions and his sworn statements at trial, so that evidence of guilt was overwhelming. The issue of his criminal awareness was, under appropriate instructions, submitted to the jury and resolved against him.

Appellant's rights were scrupulously respected throughout. The police in the performance of their duty accorded appellant all the safeguards of the law. At trial, counsel vigorously and ably prosecuted and just as vigorously and ably defended. Each maintained a high level of advocacy for his cause. The trial judge, in what was a long and difficult hearing, acted with the utmost deliberation and care to the end that a fair trial be had for all. We think a fair trial was had and the result must be upheld.

Appellant has attached an appendix to his brief which purports to be an unofficial transcript of a postconviction proceeding held June 13, 1966, at Liberal, Kansas, in case No. 8840 in the district court of Seward county, Kansas, entitled Charles Kemp, petitioner v. State of Kansas, respondent.

It appears that in the Seward county district court one Charles Kemp had previously pleaded guilty to the offense of rape upon Gladys Cora Johnson. The alleged rape had occurred near Liberal, Kansas, on March 23, 1962, at which time Gladys was about four and one half years old. The rape charge was preferred by Gladys' mother, who then lived at Liberal and was known as Betty Williams.

After it became known appellant had been convicted in Shawnee county of an offense involving the same girl, Mr. Kemp filed his application to vacate his conviction in the Seward county court pursuant to K. S. A. 60-1507. At the hearing Mr. Kemp testified he was "framed up" on the

charge by Gladys' mother, going into considerable detail as to the circumstances. It also appears the mother, Betty, had, while at Liberal, charged another man with molesting Gladys but there was no prosecution.

Although there may be question whether this record is properly before us for any purpose, nevertheless, since this is a capital case, we have examined it.

We need not detail the contents of that record. Suffice it to say it reveals no connection in any way between the two offenses. If the record of the Kemp proceeding could be said to cast doubt upon the credibility of Betty as a witness or upon her character as a good mother to Gladys, then the answer would be that the conviction of appellant does not rest in any way upon either. Appellant seems to argue that if he had had more time to prepare his defense, or that if he had had an attorney appointed promptly upon his request, he might have known about the Liberal case prior to trial. Here again, the answer would have to be the same—no connection except coincidence of the victim.

One further matter, not affecting guilt or innocence, remains: The amount of compensation for appellant's court-appointed counsel. K. S. A. 62-1304 provides such counsel "shall receive a reasonable fee for his services, which shall be set by the trial judge and the same shall be paid from the general fund of the county in which the action was tried."

Counsel made application for payment of his services in accordance with this statute, documenting it with a record of the time spent in preparation and trial, and of expense incurred. Evidently the matter was considered by the four district judges of Shawnee county *en banc* and a fee of $2,500.00 with expenses of $1,087.55 was allowed. We are asked to increase this amount.

The amount of compensation of court-appointed counsel, under the statute, rests within the sound discretion of the trial judge. Before we can disturb the amount fixed we must first find abuse of that discretion. Without in any way minimizing the quality and fidelity of the service rendered, we cannot make such finding here. We are mindful that even when substantial fees are allowed to court-appointed counsel, there may be instances of some sacrifice, but fortunately, any sacrifice now is not as great as before when members of the bar were called upon, as a part of their professional obligation, to serve without compensation or for a token amount. In the case at bar a substantial amount was allowed; we simply hold it was not so disproportionate to the service as to constitute abuse of sound judicial discretion.

The judgment and sentences are affirmed.

APPROVED BY THE COURT.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

## No. 552

WILLIAM FREDERICK ZIMMER,
*Petitioner,*

vs.

STATE OF KANSAS,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

## No. 552

WILLIAM FREDERICK ZIMMER,
*Petitioner,*

vs.

STATE OF KANSAS,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

The petitioner seeks a writ of certiorari to the Supreme Court of the State of Kansas to review the decision of that Court affirming his conviction in the District Court of Shawnee County, Kansas, on a charge of murder in the first degree (K.S.A. 21-401), and kidnaping in the first degree, with harm inflicted (K.S.A. 21-449), and his sentence to imprisonment for life for the offense of murder in the first degree, and to suffer the death penalty for the offense of kidnaping, with harm inflicted. The opinion of the Supreme Court of Kansas is reported at 198 Kan. 479 and is printed in the appendix to the petition.

## JURISDICTION

The petitioner seeks to have this Court accept jurisdiction under the provisions of 28 U.S.C. Sec. 1257 (3).

## QUESTIONS PRESENTED

1. Was there an unreasonable search of petitioner's automobile?

2. Does petitioner's failure to object to any evidence secured from his automobile constitute an adequate and independent state ground for rejecting his claim of illegal search?

3. Was petitioner denied due process of law because the trial court refused to provide him with appointed counsel from December 30, 1964, to February 2, 1965, and refused to allow a week's continuance at the time of trial on March 15, 1965?

## STATEMENT OF THE CASE

Petitioner's conviction and sentence grow out of the abduction and slaying of Gladys Cora Johnson, a seven-year-old Negro girl, on Saturday, November 14, 1964. The evidence introduced by the prosecution and the defense at petitioner's trial is adequately summarized in the opinion of the Supreme Court of Kansas (Appendix to the petition, pp. 13a to 30a).

Following the abduction of Gladys Cora Johnson in Topeka, Kansas, a massive search was begun to locate her and her kidnaper. This search began the same day, Saturday, November 14, 1964. At about 9:00 p.m. the next

evening petitioner was arrested by the Marysville, Kansas, police and taken to the police station where he was interviewed by an agent of the Federal Bureau of Investigation. When the agent asked, "Would you mind if we looked into your car?", the petitioner replied, "I don't mind at all. You can look at anything I have" (Appellee's Abstract, p. 42). At the station the FBI agent, in the presence of other officers and petitioner's brother-in-law, advised petitioner that he did not have to make a statement, that any statement he made could be used against him, that prior to making any statement he could consult with an attorney or anyone he pleased, and that any statement he made could be used against him in court (Appellee's Abstract, p. 42). The officers searched petitioner's person and found his car keys. Again the FBI agent asked him if it would be all right if they searched his car, and petitioner replied, "You can search anything I have. I have nothing to hide" (Appellee's Abstract, p. 43). The primary concern of the officers at this time was to locate the victim of the kidnaping, who was a seven-year-old child who had been missing less than 48 hours (Appellant's Abstract, p. 134).

While petitioner was being questioned by the FBI agent, two officers and petitioner's brother-in-law went to examine petitioner's car. They looked through the car with a flashlight. They discovered no weapon except a shotgun in the trunk. They also saw some red spots in the trunk. Nothing was removed from the car (Appellant's Abstract, pp. 124-126). After these men returned and reported to the FBI agent, he examined the car himself with similar results. Again nothing was removed (Appellant's Abstract, pp. 128-129).

Around midnight on Sunday, November 15, three police officers and the assistant county attorney from To-

peka arrived in Marysville. Petitioner was again advised of his right to an attorney and that any statement made by him could be used against him. Officer Monthey told him they were going to want to look at his car and to take it to Topeka for processing. Petitioner replied, "Be my guest. Do what you want with it" (Appellee's Abstract, pp. 44-45).

The two policemen who arrested petitioner testified that he appeared to have been drinking, but was not drunk or intoxicated (Appellant's Abstract, pp. 99, 124). Petitioner told the officers that he had done some drinking on Saturday. He did not tell them that he had done any drinking on Sunday (Appellee's Abstract, pp. 64-65). Officer Monthey testified that he could tell petitioner had been drinking because of the odor (Appellee's Abstract, p. 48). However, the same officer testified that during their conversations he seemed to be very coherent, appeared to understand what the officer was saying, and did not at any time act as though he did not understand (Appellee's Abstract, pp. 65, 213).

Early on the morning of Monday, November 16, petitioner and his car were taken to Topeka. About 9:00 a.m. that morning petitioner was served with a warrant issued by the District Court of Shawnee County authorizing police officers to search his car (Appellant's Abstract, p. 148). The car, which had been kept locked, was then thoroughly searched by the laboratory supervisor of the Kansas Bureau of Investigation. Several items taken from the car at this time were later introduced against petitioner at his trial. No objection was entered to the introduction of any of these items, or to the testimony concerning them.

On the night petitioner was brought to Topeka he told his brother-in-law to contact his wife and have her obtain

an attorney for him. On Monday, November 16, he was consulted by an attorney from Kansas City, Kansas, where he and his wife lived.

On November 19, 1964, Mr. Sam Crow, a practicing attorney at Topeka, was appointed to represent petitioner in his preliminary hearing in the Court of Topeka. The hearing was held on November 25, and at its conclusion the petitioner was bound over for trial in the District Court of Shawnee, Kansas.

On December 21, 1964, petitioner filed in the District Court his application for appointment of counsel. The application read as follows:

APPLICATION FOR APPOINTMENT OF COUNSEL

Comes now the defendant and applies to the Court for the appointment of counsel to represent him in the District Court of Shawnee County, Kansas.

On December 23, the District Court appointed Mr. Crow for the limited purpose of representing the petitioner at a hearing December 29, on his application. At the hearing petitioner offered no evidence in support of his application and the court then directed the petitioner be examined under oath by the State. Petitioner testified that he and his wife owned a home in Kansas City, Kansas, valued at $10,000, as well as furniture and two automobiles, all of which were free of indebtedness. He also testified that he had approximately $2,000 deposited with the railroad credit union and about $800 in a bank account, as well as government bonds in an amount between $250 and $500 (Appellee's Abstract, pp. 10-13). Income tax records introduced by the State showed that he and his wife had wages for the year 1963 in the amount of $8,448.74 for petitioner and $5,137.40 for his wife; and

for the year 1962 in the amount of $9,360.24 for petitioner and $5,154.80 for his wife (Appellee's Abstract, pp. 18-21). On the basis of this evidence, the court on December 30, 1964, found that petitioner was not indigent and was able to employ his own counsel, and also that petitioner had made no effort to employ counsel and there was no evidence that any counsel had refused him employment. Accordingly, the petitioner's application for appointment of counsel was denied (Appellant's Abstract, pp. 3-5). Petitioner also testified at the hearing that when charges were filed against him he gave his wife a power of attorney permitting her to transfer title to their property (Appellee's Abstract, p. 14). Although it is not disclosed by the record, on the day following denial of his application for counsel, petitioner's wife filed suit in the District Court of Wyandotte County, Kansas, against him asking for divorce and division of property.

Thereafter, on February 2, 1965, the District Court of Shawnee County, on its own motion, held a hearing to determine whether counsel should be appointed for petitioner. The court found that petitioner did not have counsel of his own choosing and had not employed such counsel, and further that petitioner had advised the court that he did not intend to employ any such counsel. Thereupon, the court appointed Mr. Elwaine F. Pomeroy, an attorney practicing in Topeka, to represent the petitioner (Appellant's Abstract, p. 8).

The trial commenced on March 15, 1965. Petitioner's counsel interviewed every witness who testified, prior to the time of his testimony (Appellee's Abstract, p. 243). Time sheets submitted by petitioner's counsel and his brother who is associated with him in the practice of law indicate that they spent a total of approximately 330 man

hours preparing for trial (Appellant's Abstract, pp. 510-516). On March 12, 1965, petitioner's counsel requested a continuance of one week "so as to allow us to adequately prepare for the defense." No other reason was advanced for the motion, and the reason given was not elaborated. This motion was denied by the court.

The jury returned a verdict of guilty, and petitioner was sentenced as previously indicated. His conviction and sentence were affirmed by the Supreme Court of Kansas on April 8, 1967. He then filed this application for a writ of certiorari.

## ARGUMENT

### I. There Was No Unreasonable Search of Petitioner's Automobile.

The examination of petitioner's automobile made without a warrant shortly after his arrest, was done for the sole purpose of locating the missing child, Gladys Johnson. The officers were not searching for evidence against the petitioner and nothing was obtained from this examination which was later introduced in evidence against him at trial. For this reason, petitioner is not entitled to complain about the legality of this "search". The only evidence taken from the automobile and introduced against him was obtained after a valid warrant had been issued and served upon him in Topeka. Petitioner has never challenged the validity of this warrant and hence the facts surrounding its issuance are not completely disclosed by the record. However, the record does disclose that a wealth of independent evidence was already in the possession of law enforcement officers, and it may safely be presumed that such evidence provided a sufficient basis for issuance of the warrant, without reli-

ance on anything observed at the time the car was examined to find the missing child.

Furthermore, the record is replete with evidence of petitioner's voluntary and intelligent consent to the initial examination of his car shortly after his arrest. An agent of the Federal Bureau of Investigation, who had assumed charge of the investigation at Marysville, Kansas, when the petitioner was apprehended, testified that he asked petitioner if he would mind if they looked into his car and received the reply, "I don't mind at all. You can look at anything I have" (Appellee's Abstract, p. 42). Following this conversation, petitioner was removed to the police station at Marysville. He was advised of his right to remain silent and the right to consult with an attorney or anyone else he chose (Appellee's Abstract, p. 42). At the police station, petitioner was searched and his car keys removed and the FBI agent again inquired if it would be all right if they searched his car. He was again advised, "You can search anything I have. I have nothing to hide." (Appellee's Abstract, p. 43). Later that same night, Topeka police officers arrived at the scene and interviewed petitioner. At this time he was again advised of his right to remain silent and to consult with counsel (Appellee's Abstract, p. 44). The Topeka police advised him that they were going to process his automobile, to which he responded, "Be my guest. Do what you want with it" (Appellee's Abstract, p. 45).

The rule is well established that the constitutional immunity from unreasonable searches and seizures may be waived by consent to the search or seizure. As this Court said in *Zap* v. *United States*, 328 U.S. 624 (1946):

> . . . the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. 328 U.S. at 628.

*Accord: Robbins* v. *MacKenzie*, 364 F.2d 45 (1st Cir. 1966), *cert. denied* 385 U.S. 913 (1966); *Chapman* v. *United States*, 346 F.2d 383, 387 (9th Cir. 1965), *cert. denied* 383 U.S. 909 (1965); *United States* v. *Page*, 302 F.2d 81 (9th Cir. 1962); *United States* v. *Brown*, 296 F.2d 565, 566 (4th Cir. 1961); *Shores* v. *United States*, 174 F.2d 838, 845 (8th Cir. 1949); *Ruhl* v. *United States*, 148 F.2d 173, 174 (10th Cir. 1945). For a case in which consent to search an automobile was found under circumstances similar to those presented here, see *Robinson* v. *United States*, 325 F.2d 880, 884 (5th Cir. 1964).

There is no evidence that the petitioner was under the influence of intoxicating liquor at the time he consented to the search of his automobile. Officer Monthey testified that the only evidence that petitioner had been drinking was that of odor (Appellee's Abstract, p. 48). The officer specifically testified that the petitioner was at all times coherent, appeared to understand his statements, and that his own remarks were reasonable, realistic and competent (Appellee's Abstract, pp. 65, 213). There is no reason to believe that petitioner was not in complete control of his faculties. He had been advised of his right to consult with counsel and was in fact in the presence of and consulted with his brother-in-law at the time he consented to the examination.

Aside from the fact that this original examination of petitioner's car did not produce anything used against him and aside from the fact that he voluntarily consented to it, the record reveals that at this time the kidnaping was less than 48 hours old, and the victim was a small child, thinly dressed, whose whereabouts and condition were unknown. The first concern of everyone, as stated by the FBI agent at the trial, was to find the child (Appellant's Abstract, p. 134). A sincere effort to this end, un-

der the circumstances present here, certainly justifies the limited examination of petitioner's automobile without a warrant which was made in this case.

**II. The Judgment Below Rejecting Petitioner's Search and Seizure Claim Rests on an Adequate and Independent Ground of Kansas Law.**

The record shows that all evidence obtained from petitioner's automobile which was introduced against him was admitted without objection. The court below gave this as one reason for rejecting petitioner's search and seizure claim. It is well settled in Kansas that where evidence is admitted without objection at the trial of a criminal case, belated objections to this evidence on appeal will not be entertained. This so-called contemporaneous objection rule is embodied in K.S.A. 60-404, which provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.

The Kansas Court has firmly adhered to this rule in its decisions. E.g., *State* v. *Donahue*, 197 Kan. 317, 416 P.2d 287 (1966); *State* v. *Freeman*, 195 Kan. 561, 408 P.2d 612 (1965); *State* v. *Wade*, 190 Kan. 624, 376 P.2d 915 (1962).

This Court recently examined the propriety of such a contemporaneous objection rule in *Henry* v. *Mississippi*, 379 U.S. 443 (1965). The decision reaffirmed the principle that this Court will decline to review state court judgments which rest on independent and adequate grounds of state law, but noted that "a litigant's procedural defaults in state proceedings do not prevent vin-

dication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest." 379 U.S. at 447. Applying this test to the Mississippi contemporaneous objection rule, this Court concluded:

> The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided. 379 U. S. at 448.

The question present in *Henry* as to defense counsel's unfamiliarity with the State rule is not involved here. Petitioner's trial counsel had been a member of the Kansas Bar practicing in Topeka for more than ten years and was well deserving of the high compliment paid him by the Kansas Supreme Court for the representation here provided.

### III. Petitioner's Right to Counsel and His Right to Adequate Time for Preparation Were Not Denied.

The trial court's finding on December 30, 1964, that the petitioner was not indigent and therefore not entitled to appointment of counsel is supported by a wealth of convincing and uncontradicted evidence. In particular, he testified that he and his wife owned a home in Kansas City, Kansas, valued at $10,000, as well as furniture and two automobiles, all free of indebtedness; that he had approximately $2,000 on deposit with the Railroad Credit Union, about $800 in a bank account, and government bonds of $250 to $500 (Appellee's Abstract, pp. 10-13). Income tax records introduced in evidence showed that he and his

wife had wages in 1963 totaling over $13,500 and wages in 1962 totaling over $14,500 (Appellee's Abstract, pp. 18-21). Petitioner's application for appointment of counsel stated no supporting reasons, and he offered no evidence in support of it at the hearing December 29, 1964. In fact, he testified in response to questioning by the State that between his preliminary examination and his application for counsel he had made no attempt to secure counsel of his own choosing and that no attorney had refused to represent him (Appellee's Abstract, p. 16). The truth of the matter appears to be that while petitioner could afford his own counsel, he chose to rely upon the court to appoint an attorney at no cost to himself. This is further borne out by his testimony that after criminal charges were filed against him, he gave a power of attorney to his wife permitting her to transfer title to their property (Appellee's Abstract, p. 14). Under these circumstances, it cannot be said that petitioner's right to counsel guaranteed by the United States Constitution was denied.

This is true not only because petitioner could afford to obtain his own counsel, but also because he was not prejudiced in any way by the denial of his application on December 30, 1964. He had previously been represented by appointed counsel for his preliminary hearing, counsel being appointed November 19 for the hearing on November 25. He was represented by appointed counsel at the hearing on his application for appointment of trial counsel on December 29, 1964. On February 2, 1965, the trial court, on its own motion, after hearing, found that petitioner did not have counsel of his own choosing and had advised the court that he did not intend to employ such counsel, and thereupon appointed Elwaine F. Pomeroy of Topeka for the petitioner. The trial did not commence until March 15, 1965, giving counsel approximately six weeks to prepare.

During the period December 30, 1964, to February 2, 1965, nothing occurred which raises even a possibility of prejudice to petitioner at his trial in March. No incriminating statements were taken from him, as in *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964); and *Massiah* v. *United States,* 377 U.S. 201 (1964). No vital defenses were lost to the petitioner, as in *Hamilton* v. *Alabama,* 368 U.S. 52 (1961), nor was a plea of any kind entered by the petitioner during this period, as occurred in *White* v. *Maryland,* 373 U.S. 59 (1963). For these reasons, the period from December 30 to February 2 did not constitute a critical stage in the proceedings against this petitioner, and denial of his request for appointed counsel at this stage would not have been a denial of his constitutional right to counsel even if he had in fact been indigent.

Certainly it cannot be contended that petitioner's counsel was allowed insufficient time to prepare for trial. Petitioner's counsel admitted, during the hearing on the motion for a new trial, that no witness testified who had not previously been interviewed by him (Appellee's Abstract, p. 243). The time sheets submitted by petitioner's counsel and his brother, with whom he is associated in the practice of law, indicate that a total of approximately 330 man-hours was spent preparing for the trial. Examination of the voluminous trial record reveals that defense counsel was extremely well prepared. Nothing of consequence has been suggested by the petitioner which his counsel might have done to prepare a more adequate defense.

Petitioner's claim that he was denied due process of law because his request for a week's continuance was denied is refuted by this same record of massive preparation on the part of his counsel. The conclusion that counsel was fully prepared for trial is reinforced by the fact

that no particular reason was advanced in support of the motion for continuance, nor was any showing made at the hearing on the motion for a new trial that petitioner was prejudiced in any concrete way by the denial of a continuance.

Petitioner concedes that the granting or denial of a continuance has traditionally been left largely to the discretion of the trial judge. In this case, where review of a state conviction is sought, petitioner must show an abuse of this discretion amounting to a denial of due process of law. No such showing has been made here, where the record reveals thorough and extensive preparation by defense counsel and nothing of consequence that counsel might have done in the extra week requested.

## CONCLUSION

For the foregoing reasons, petitioner's claims of constitutional violation are without substance and the writ of certiorari should be denied.

Respectfully submitted,

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